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OF THE UNITED STATES.

STEPHEN DUNCAN, Appellant,

versus

WM. GEGAN, ELAM BOWMAN, BARBARA S. BOWMAN, JOHN SMYTH AND REBECCA M, his Wife, Appellees.

BRIEF OF THE APPELLANT.

STATEMENT OF THE CASE.

ROBERT MOTT,
THOS. J. SEMMES,
of Counsel.

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Stephen Duncan was the holder of notes made by Elam Bowman amounting to over twenty thousand dollars, secured by mortgage on Waver Tree Plantation in the Parish of Tensas, State of Louisiana, the notes were dated 24th January, 1855, the mortgage was executed 2d February, 1855, and bore on the west half of section 36, the whole of section No. 35, the whole of section No. 34, the whole of section No. 27, the whole of section No. 28, one-half of section No. 33, the Southeast forty acres of section No. 33, the Southwest eighth of section No. 25, and the Southeast eighth of section No. 25, all in Township 10, of Range 11 East, and contain-

ing in the aggregate three thousand five hundred acres of land, See petition, pp. 18 and 19, and mortgage, pp. 19 to 23. On these notes and mortgage suit was commenced by service of citation on the 30th December, 1865, on an attorney appointed to represent the absent defendant Bowman, and which attorney filed an answer on the 18th May, 1866, p. 24, and on the 19th May, 1866, an order was made for the sale of the property, to pay the sum of $23,000, with interest at the rate 8 per cent. per annum on $12,000, from 1st January, 1861, subject to a credit of $2000 of date 1st January, 1862; and a like rate of interest on $11,000, from 1st January, 1862, and that the property mortgaged be seized and sold to pay said debt, p. 30.

The mortgage was signed by Mrs. Barbara S. Bowman, wife of Elam Bowman, *who renounced all her liens, privileges and mortgages on the property mortgaged in favor of the holder of the mortgage notes.*

Note, that this order of sale was rendered on the 19th May, 1866, p. 30.

On the 17th May, 1866, Mrs. Barbara S Bowman, wife of Elam Bowman, appeared, *by the same attorneys as those who appeared for Duncan, the appellant*, and producing to the Judge the declination of her husband, asked to be permitted to sue her husband, as, by the laws of Louisiana, married women are permitted to do, and being so

authorized by the Judge, she brought her suit on the said 17th May, 1866 p. 38. Bowman filed his answer on the same day, (39), and on the same day, on the testimony of Bowman alone, (40), judgment was rendered in her favor (40) against her said husband for $13,278 42 with interest, with a *legal and tacit mortgage on all his property;* and this legal and tacit mortgage was, if of any value, antagonistic to the mortgage of Duncan. She issued execution on her judgment, but no sale took place thereunder.

William Gegan on the 3d April, 1869, filed his suit, making S. Duncan and Barbara S. Bowman, defendants, pp. 12 and 13, averring that he had a mortgage on the tract of land being part of Wavertree plantation, viz: Sections 27, 34, 35, in township No. 10, North of range, 11 East, containing 1920 acres. That through his former tutor, Mr. Wm. M. Shaw, a writ of seizure and sale issued against said property, which was seized and advertised for sale, on the 29th July, 1868, but before the day of sale the writ was by his own order returned unsatisfied. That Mrs. Bowman upon a judgment obtained 18th May, 1866, in a suit against her husband caused execution to be issued. That Mrs. Bowman's judgment was fradulently obtained through fraud and collusion of the spouses, and should be annulled. Farther, that on the 2d February, 1855, Elam Bowman

mortgaged 3,400 acres of land including, that mortgaged to him Gegan to Stephen Duncan, that the inscription of mortgage to Duncan was not renewed until after the lapse of more than ten years after its date, whereby it ceased to have effect, and thereby lost its priority over his later mortgage, and that its subsequent re-inscription would not revive it to the prejudice of his, Gegan's mortgage. That Duncan's mortgage had been made executory and the property seized and advertised for sale 3d April, 1869, *he prays to be permitted to intervene in Duncan's suit and to be decreed a preference on the proceeds of sale*, pp. 1, 2 and 3.

Thus three persons were claiming privilege or mortgage rights on the same property, Duncan and Mrs. Bowman on the whole and Gegan on 1920 acres. Both Duncan p. 5, and Mrs. Bowman p. 4, answered to Gegan's intervention.

On the 27th October, 1869, the following agreement was signed.

WM. GEGAN,
vs.
BARBARA S. BOWMAN,
DUNCAN AND SHERIFF.

This was agreed by the parties in this cause, that this case shall be tried as upon a concurso. That the court shall decide upon and fix the rank and preference of the three mortrages held by Gegan, Duncan and Mrs. Bowman, pp. 4 and 5.

Signed :

WM. B. SPENCER,
Attorney for Wm. Gegan.
JULIUS ARONI,
Attorney for Mrs. Bowman.
FARRAR & REEVES,
Attorneys for Stephen Duncan, Jr.

The counsel who obtained Mrs. Bowman's judgment signed this agreement, as the Attorneys of Duncan, p. 5.

On the trial it was admitted, that Elam Bowman was insolvent, consequently the contest was for the proceeds of the property subject to the mortgages of the three contestants.

At the time of the trial of the case, the property was not under seizure in either of the cases.

Judgment was rendered p. 54, and all parties by their counsel appealed p. 53.

The Supreme Court of Louisiana, decided as follows: "That the judgment appealed from, be reversed, and the case remanded to the lower court, to be proceeded with in accordance with the foregoing views and according to law," p. 56.

No action was taken in the lower court to have the case assigned for trial or tried, but Mrs. Bowman issued execution on the 12th July, 1870, more than four years from its rendition, seized and sold the property, under her aforesaid judgment, for $11,230, to Rebecca M. Bowman, wife of John Smyth, p. 49. On this bid and sale no money was

paid. See testimony of A. Boudrevant, Deputy Sheriff, who made the sale, p. 10.

Mrs. Smith, the purchaser, was the adopted daughter of Elam Bowman and wife, testimony of Reeve Lewis, p. 104. All the parties, Bowman and wife, Smyth and wife, lived on the Wavertree plantation, before and after the sale by the Sheriff, p. 101.

It appears, from the disclaimer filed by Gegan that he has no interest in the case, having sold to Mrs. Smith, p. 79.

Duncan, p. 56, filed his petition, and moved for removal of the case to the Federal Court, which was granted on 26th April, 1876, p. 58, but on 27th April, 1876, on motion of counsel for Gegan, the order of transfer was annulled by State Court, p. 58. Notwithstanding this the transcript was filed in the United States Court, for the District of Louisiana, on the 6th November, 1876.

On the 3d January, 1877, Mrs. Bowman appeared in the United States Circuit Court, and filed an exception to the jurisdiction of the court, on the ground that the merits of the controversy had been passed upon and the decree res adjudicata; because of the citizenship of the parties; Gegan who was one of the parties' plaintiff, being with two of the other parties, citizens of Louisiana, and because no sufficient oath had been made for removal, p. 60. This exception was overruled. The plaintiff filed his bill in equity, p. 61.

The case being in the United States Circuit Court, and being within the equity jurisdiction, Duncan properly filed his bill (p. 61) against Elam Bowman, Mrs. Bowman, Wm. Gegan, John Smyth and his wife, setting forth the above facts, and that the judgment obtained by Mrs. Bowman against her husband was null and void and of no effect.

1. Because the same was by consent of parties.

2. The only proof offered was that of her husband.

3. The said judgment was not advertised according to law.

4. It was not executed immediately, as by law required, but was afterwards executed, when null and void. That his (Duncan's) mortgage was duly and legally recorded on the 3d February, 1855, and duly and legally reinscribed on 13th September, 1865, and again reinscribed in 1875, and that during the period of time between the 1st February, 1861, and the 23d August, 1865, the said parish of Tensas was in a state of war, there was no civil authority there, and the record and books of the Recorder's office of that parish were removed during the whole of that period from said parish, and there was during said period of time no recorder's office in said parish, where said mortgage could have been reinscribed, and that said time should be deducted from the law requiring the reinscription of mortgages in ten years, and therefore the rein-

scription of Duncan's mortgage on the 23d August, 1865, was within the proper period.

That the sale of said property, under the judgment of Mrs. Bowman, was absolutely null and void, and that the property is still subject to the mortgage of Duncan, and prayer is made for the enforcement of the mortgage and the rejection of all claims of Mrs. Bowman and Mrs. Smyth.

The defendants sever in their answers; Bowman and his wife admit the execution of their mortgage to Duncan, which, they aver, was reduced to judgment according to the laws of Louisiana, and that the notes became merged in the judgment, subject to the prescription of ten years, unless revived by a citation in the nature of a scire facias within that time; and that no such revival had taken place, wherefore the said judgment was prescribed and lost, and the rights of Duncan gone; that the mortgage was but accessory to the notes, and the notes having been prescribed the mortgage went with them.

That the right of the parties had been determined by a judgment of the Supreme Court of Louisiana, which placed the mortgage of Duncan as third in rank.

That Duncan's mortgage was not properly reinscribed.

That the judgment of Mrs. Bowman was maintained by the decree of the District Court and

affirmed by the Supreme Court, which finally and definitely determined between the parties to it the prior rank of both the Gegan and Mrs. Bowman mortgage to that of Duncan, and the cause was remanded to the District Court merely that the decree of the Supreme Couat might be carried into execution at the instance of any party in interest, who in due time should apply to said District Court to that end.

That no suit was pending in the State District Court when the application was made for its removal, as the judgment of the Supreme Court was final and res adjudicata. pp. 73 to 79.

Smyth and wife, answer substantially as Bowman and wife by adopting their answer as far as it goes, and they further say that prior to the sale of Wavertree, at which Mrs. Smyth purchased the same, she became the owner by transfer of the judgment, mortgage and notes of Gegan.

That the purchase of Wavertree was bona fide in open market, and that she had ample means to purchase, and that it is a matter of no interest to Duncan, as he had no rights to be affected. pp. 70 to 73.

Gegan answered, setting forth very much the same defense as the other defendants, and then says that he has sold out to Mrs. Smyth and has no interest in the results. pp. 79 to 82.

The testimony shows that Mrs. Smyth was an

orphan, adopted by Elam Bowman and wife, and had no property. Testimony of Shaw, p. 91; of Guice, p. 95; of Reeve Lewis, p. 104., also testimony of Winchester.

That at the sale by the Sheriff, when Mrs. Smyth bought Wavertree, she paid no portion of the price. Testimony of Bondurant, p. 101.

The record shows, that the attorney, who procured the order on the 19th May, 1866, to sell Wavertree to satisfy Duncan's mortgage, p. 19 and p. 30, 31, and was employed by Duncan to do so, p. 88, was the attorney who brought the suit of Mrs. Bowman against her husband, and on the 18th May, 1866, took a judgment in her favor with the intent to give her a legal and tacit mortgage on all his property superior to Duncan's privilege, that the answers of the husband on which the judgment was recovered, are in the hand writing of this attorney. See testimony of Boudervant, p. 101, and of Worrell, p. 102, and he acted as the appraiser of Mrs. Bowman in her said suit, on the 3d November, 1866.

The record shows, that there was no testimony offered in the suit of Mrs. Bowman vs. her husband, except her husband's sworn answer, p. 40.

The record shows, that Duncan did not obtain a personal judgment against Elam Bowman but what was in effect an order to seize and sell the mortgaged property. No service of citation was

made or asked to be made on Elam Bowman; an attorney was appointed to represent him and on this attorney service of citation was made. See petition and order appointing Clinton, attorney, p. 19. On whom service of citation was made, pp. 23 and 24, and who appeared therein.

The testimony further shows, that neither the appellant Duncan nor his agent Winchester, knew what was being done to Duncan's prejudice in Louisiana, and neither of them ever knew of the concurso, nor of the appeal to the Supreme Court, nor of the decree of that court, after it had taken place.

We print the whole of Mr. Winchester's testimony commencing at p. 87, of the record which is as follows:

JOSIAH WINCHESTER, being duly sworn, testified as follows:

By agreement T. Otis Baker, counsel for defendants, it was agreed that the evidence of Mr. J. Winchester should be taken in a narrative form.

In 1863 Dr. Stephen Duncan placed in my hands for collection as an attorney at law at Natchez, Miss., a large number of mortgage notes extending over Mississippi and Louisiana, with instructions not to sue upon them when I could make arrangements with the debtors for the payment of the respective claims by extending them time, and he authorized me to give five years

to the debtors after the close of the war, but desired me to see that his mortgage claims should be kept alive. Among these claims was a debt of Elam Bowman, secured by mortgage on land in Tensas Parish, Louisana.

I saw, upon looking over the mortgage, that it would have to be re-inscribed. In the Spring of 1865, I made efforts in 1865, to have it reinscribed before the time at which it would have run out, but learned that there was no recorder in Tensas Parish, Louisiana, where the mortgaged property was situated; that it was impracticable to have the re-inscription made. So soon as I learned that a recorder had been appointed, some time in September, 1865, I immediately went to St. Joseph, the parish seat of Tensas Parish, and saw the recorder. He informed me that the books and papers of the office had been returned the night before on the same boat on which I had gone up from Natchez to St. Joseph. That morning he opened the office of the recorder, and opened the boxes in which the papers and records of the office were found, and we hunted for the mortgage of Elam Bowman and found it, and I had the same re-inscribed on the same day, which was some two or three months after the ten years had expired for for re-inscription. The recorder informed me that the papers and records had been sent for safe-keeping to a place back of Natchez, and had just

been returned; and that this was the first business that he had performed as recorder. Finding in 1866 that it was impracticable to make arrangements with the debtors of Dr. Duncan for the extension of time, I advised him that he had better foreclose his mortgages, and requested him, as I did not practice law in Louisiana, to name some attorney to whom I should give the mortgages in Louisiana for collection. He, Dr. Duncan, stated that he understood lawyers in our State sometimes divided fees with lawyers in another and desired that I should try and make an arrangement with some lawyer in Louisiana to act for me, and take the collection of the notes and mortgages in that State.

Accordingly I made arrangements with Thos. P. Farrar, of the firm of Farrar & Reeves, attorneys at St. Joseph, in 1866, that they should take the mortgage notes of Elam Bowman and forclose the mortgage, and we would divide fees. I placed the notes and mortgage in their hands, and they took out an order of seizure and sale, and perfected a judgment against Elam Bowman and his wife, and advised me that Elam Bowman would arrange the payment of the debt so soon as the controversy between him (Bowman) and some of his other creditors was settled in court, and that it would be to the interest of Dr. Duncan not to press an execution and sale of the property till after that controversy

was settled; that there was no question about the claim of Dr. Duncan, and it would be amply secured by the judgment, and the property would always be liable for his debt. I saw Mr. Smythe several times, and he mentioned to me as acting for Mr. Bowman, that as soon as that controversy was settled between Bowman and his other creditors, he would be prepared to make a proposition for the settlement of the debt due to Dr. Duncan or his heirs which would be perfectly satisfactory. Lulled into security from the representations of Mr. Farrar and of Mr. Smythe, that the debt would be eventually satisfactorily arranged, I took no steps to have the mortgaged property sold, or in the proceedings of Bowman against his creditors. I learned in 1869, latter part, or the first of 1870, that the Supreme Court, of Louisiana, had decided that a mortgage of Stephen Duncan had been placed behind all the other creditors of Elam Bowman, and unless we took up the other claims that Dr. Duncan's mortgage would be cut out, and that the Supreme Court had entered a judgment against the estate of Dr. Duncan for all the costs of the litigation. So soon as I learned of this decision, I requested Mr. Farrar to present a petition for a re-argument in the case. He informed me that he had done so, and upon condition of his petition the court had refused to grant it. Subsequently, I desired Mr.

Farrar to see if the case could not be removed to the United States Court. He informed me that he did not think it was possible to do so.

Afterwards, having employed H. W. Drake, an attorney-at-law, in Tensas Parish, to look after some other matters connected with the estate of Dr. Duncan in that parish, to look into this case and see if it could not be removed to the United States Court, after looking into it, Mr. Drake advised me that he thought it could be removed, and that he thought that there was a reasonable chance of securing the debt of Dr. Duncan in the United States Court, and I then employed him to take the necessbry steps to have it removed; I had no knowledge of the controversy between Elam Bowman and his other creditors; I understood Messrs. Farrar & Reeves, were the representatives of Elam Bowman in that controversy, but was lulled into security upon the representations of both Messrs. Farrar & Reeves, and also Mr. Smythe, that Dr. Duncan's interest was not at all involved in the controversy, and that his debt would be secured so far as the value of the property embraced in the mortgage would secure it. I will state further that I have known Elam Bowman since 1839; that he was the brother of Mrs. A. L. Wilson, and that it was generally understood, and I believe it to be a fact, that Mr. Bowman and A. L. Wilson were jointly interested in the plantation in Tensas Par-

ish, on which the mortgage was located; that neither Mr. Bowman nor Mr. Wilson had any children of their own, but they each adopted two orphan children, and that Mrs. Smythe was one of the two, which were sisters, adopted by Mr. Bowman.

(Signed) J. WINCHESTER.

POINTS OF LAW AND FACT.

There is no dispute as to the fact that the appellant had the first mortgage on the Wavertree plantation and that Mrs. Bowman waived her mortgage rights in favor of appellant, and that all the parties had notice of the same.

There is no claim on the part of any one, that Gegan had more than a second mortgage and that Mrs. Bowman did not waive any of her rights in his favor, and that his mortgage affected only a part of the land mortgaged to Duncan.

The only contestants, who claim anything at this time, are Mrs. Bowman, wife of Elam Bowman, who sets up a tacit mortgage and Mrs. Smythe, who claims as purchaser under her adopted mother's pretended tacit mortgage, and as assignee of Gegan's mortgage, and Duncan as first mortgage creditor.

1st. We aver and are prepared to maintain the position, that Mrs. Bowman, never had any rights of mortgage, that she could exercise against Dun-

can, and that at the time she took her judgment and ever since she has had no mortgage against any one. She waived all her mortgage rights and privileges in favor of Duncan in his Act of Mortgage, p. 29.

The Constitution of Louisiana of 1868, article 123, declared: "The General Assembly shall provide for the protection of the rights of married women, to their dotal and paraphernal property, and for the registration of the same, but no mortgage or privilege shall hereafter affect third parties, unless recorded in the parish where the property to be affected is situated. *The tacit mortgages and privileges now existing in this State shall cease to have effect against third persons after the* 1*st January*, 1870, *unless duly recorded.* The General Assembly shall provide by law for the registration of all mortgages and privileges." By act No. 95, approved 8th March, 1869, in section 1, the Legislature enacted, "That in order to preserve the mortgages and privileges accorded by law in favor of married women for the preservation of their dotal, paraphernal or other rights against their husbands, it shall be the duty of every married woman, or any person for her, to cause to be recorded in the mortgage book in the parish or parishes in which her husband may own mortgageable property, the evidence of their mortgage or privilege. If it be in the shape of a public act, or act

under private signature, act of partition, judgment, or other written act, the same must be recorded in the form now required in recording such acts, and if not in the shape of a written act, as above indicated, then a written statement, made by the wife or the husband, or any other person having knowledge of the fact of the amount due to the wife, for which she may be entitled to a mortgage or privilege against her husband, by existing or any subsequent law, *detailing accurately the facts and circumstances on which such claim may be based*, which written statement shall be sworn to by the person making it, and duly recorded as above directed." Section 10 provides "That the recording of any instrument, according to the provisions of this act, shall have the effect of operating a mortgage or privilege, as the case may be, on the property of the person owning or subject to the mortgage or privilege, but shall have no other effect; it shall in no manner be evidence of the validity of the debt or claim other than the law may accord to acts of the kind unrecorded."

The mortgage certificate in the record of Mrs. Bowman vs. Her Husband shows that no mortgage of Mrs. Bowman was duly recorded according to law against her husband's property before the 1st January, 1870, and the sale at which Mrs. Smyth purchased Wavertree was made 3d Septem-

ber, 1870. The mortgage certificate annexed to the Sheriff's return, p. 52, dated the 1st September, 1870, does not show a compliance with the constitutional provision and the act of 1869. Consequently Mrs. Bowman had no mortgage and no claim as against third parties, when the Wavertree Plantation was adjudicated to Mrs. Smyth, 3d September, 1870, and the same being void, no sale took place. The Civil Code of Louisiana, in force at that time, article 3330, article 3366 R. C. C., says: "To obtain an inscription of a public act or judgment the creditor, either in person or by an agent, shall present an authentic copy of the act or judgment to be recorded to the Register of Mortgages of the place where the inscription is to be made."

The judgment was not recorded as rendered, but a part of it was recorded. See judgment, p. 40, and see mortgage certificate, p. 52. The judgment must be recorded as rendered. Williams vs. Holloway, 11 La. 516.

In the case of Taylor vs. Eller, 22 Annual, 278, the plaintiff recovered a judgment against her tutrix or guardian, in August, 1869, for a sum of money due her. This judgment was recorded 22d September, 1869, in the general mortgage book, the same as Mrs. Bowman's judgment. In October, 1869, she instituted her suit against a third possessor of property, who, in February, 1870, filed

an exception—that the tacit mortgage, if it ever existed, had not been recorded prior to 1st January, 1870, and was lost. The Court maintained the exception, and said: "It is clear that the plaintiff has not recorded the tacit mortgage in the manner pointed out in sections 10 or 11 of the act of 1869. It is not necessary in this case to decide whether or not the recording of a judgment which recognizes a tacit mortgage and fixes the amount and date thereof would be a compliance with the requirements of the Constitution and the act of 1869, because the judgment recorded in this case is not such a judgment, it *does not mention the date of the mortgage.*" The record of Mrs. Bowman's mortgage shows that the judgment was not recorded, but a synopsis thereof, *(p. 52)*; it does not show the date of the tacit mortgage, nor what it was for, nor any of the particulars thereof; it was absolutely null and void when attempted to be enforced.

Ford vs. Tilden, 7 La. Annual. 534.

Succession of Cordenolle vs. Dawson, 26 A. 535.

Rochereau vs. Delacroix, 25 A. 584.

Secondly. The judgment of Mrs. Bowman was absolutely null and void, and never had any effect, because the same was a consent judgment, or rendered on the sole testimony of her husband, C. C. 2401; Willis vs. Ward, 30 A. 1285; and because the same was not executed by the payment of the rights of the wife, made to appear by an authentic

act, as far as the estate of the husband can meet them, or at least by a *bona fide* non-interrupted suit to obtain payment. C. C. 2402.

This was not a bona fide suit, prosecuted by the wife against the husband. The petition was filed by Mrs. Bowman on the 17th May, 1866. On the same day her husband filed his answer, in which he admits the correctness of the averments of the petition, and on the same day answered interrogatories on facts and articles, thus proving her claim, and on the 18th May, 1866, one day after the suit was commenced, it was submitted to the Court by consent, for it could not have been fixed for trial in that short time, and on the same day the judgment was rendered.

C. C. 2401; R. C. C. 2427.

If, by consent, the judgment was absolutely null; if the requirements of the law were not all fulfilled, the judgment is null.

The said judgment was not immediately executed, and was consequently absolutely null. C. C. 2402; R. C. C. 2428.

These articles have been commented on by the Supreme Court of Louisiana.

In Bertie vs. Walker, 1 Rob. 432, it was said: "The decree of separation, whatever may be its terms, does not render the parties separate of property; *it entitles* the wife to a separation, but this right vanishes if not followed by a prompt and

bona fide execution of the judgment. It is all important for the protection of the creditors of a married man, under a system of laws like ours, that these requisites of the Code should be rigorously insisted on." The tardy attempt to execute the decree of separation several months after the seizure (of the property of the husband) cannot affect the rights of judgment creditors if they had acquired any under it. If the separation was null at that time, the community was not dissolved. * * * "Under these circumstances we do not see that there was any necessity for the creditors of James E. Bertie (the husband) to institute a direct action against the plaintiff," (to annul her judgment.) The judgment was not a judgment and conferred no right whatever.

The same point was decided in Longing vs. Blackstone, 4 An. 514, and again in Succession of Hearing, 28 An. 151.

The judgment was obtained two months and twenty days before execution was issued, and that execution was returned by order of counsel, and not attempted to be levied or enforced, pp. 40, 41, nor was any real attempt made to enforce the judgment until 1870.

Thirdly. The decree of the Supreme Court of Louisiana was not final. Neither party could have removed the same by writ of error into the Su-

preme Court of the United States on the ground that it was a final judgment or decree.

The judgment of a Supreme Court of a State, reversing that of a lower court, and remanding the cause for further proceedings, according to law is not final. McCourt vs. Commissioners, 91 U. S. (1 Otto) 1, where the Court said: "The judgment of the Supreme Court is one of reversal, as such it was not a final judgment." "The Supreme Court, so far from putting an end to the litigation, purposely left it open. The law of the case upon the pleadings as they stood was settled; but ample power was left on the common pleas (lower court) to permit the parties to make a new case by amendment."

The decree of the Supreme Court was "that the judgment appealed from be reversed, and this cause remanded to the lower court, to be proceeded with in accordance with the foregoing views and according to law." It is therefore plain that the case was open to amendment and to be tried again, and while in that condition was subject to amendment, new proofs and removal to the United States Court

The same doctrine was laid down in Kimball vs. Evans, 93 U. S. 320, where the Supreme Court, having decided one point in the case, remanded it for further proceedings, according to law, and de-

clared that the judgment was not final, and was open for further proceedings.

Fourth. The Circuit Court had jurisdiction. Duncan, the plaintiff, was a citizen of New York; Mrs. Bowman was a citizen of Louisiana, and so was Gegan; each party was averring a several right as plaintiff. The contest was one contest, viz: The priority of privilege on the same property. It was a concurso, where every person is for himself.

In a concurso all the creditors are plaintiffs. See the case of Meyer & Dennison, decided by this Court 15th December, 1879; Avery vs. His Creditors, 8 An. 371,

Fifth. The bill of Duncan was properly filed, and should have been maintained. He was a citizen of one State and all the defendants citizens of another, State where the suit was brought, which gave the Court jurisdiction.

Sixth. The case was pending and undecided, and properly removed to the United States Court on the application of Duncan. See the case of Meyer & Dennison vs. The Felman Construction Co., decided 15th December, 1879.

Seventh. The testimony shows that the mortgage could not have been recorded during the first ten years; all legal rights were suspended by the war, and it was re-registered as soon after as possible, and was registered again and again.

Adger vs. Alston, 15 Wall. 561.

And the appellant has ever since that time been endeavoring to have his mortgage enforced by proceedings in court, which have been interrupted and delayed by his debtor's wife and family, and by the action of Duncan's attorney in taking Mrs. Bowman's judgment against the interest of Duncan.

Eighth. The point that appellant's notes have been merged in a judgment, and that the judgment is prescribed, is not well taken; for this, that appellant merely applied for a sale of the property to satisfy his mortgage, and had an attorney appointed on whom service was made; no personal judgment could be rendered on this service See Paget vs. Curtis, 15 A. 451. This was nothing more than a proceeding against the property, which has been pending ever since, and under which it should now be sold. Suc. of Wilson, 12 A. 592.

RESUMÉ.

All the parties admit the fact that Duncan had a mortgage, and that Mrs. Bowman renounced all her mortgages and privileges in his favor; and all the parties had notice, actual as well as constructive notice, of Duncan's mortgage, and that he has been continuously endeavoring, for many years, to enforce the same.

Mrs. Bowman never had a judgment against

her husband. She did not register her tacit mortgage as required, and she lost it. The recordation of the judgment was not a registry of her tacit mortgage, because that judgment was a nullity, and if it was intended to comply with the act of 1869 it did not contain the necessary information, and was not in compliance with the requirements of the law, which must be strictly fulfilled; if filed as a written statement, it contained no sufficient compliance with the act.

The decree of the Supreme Court did not decide anything, and the court to which the case was remanded did not decide anything. There is no existing decree, between the parties, no final judgment, except the one from which we have appealed. We were not, in effect, parties to the appeal to the Supreme Court of Louisiana, nor in fact to the judgment of the lower court. We had no day in court in consequence of Mrs. Bowman's attorney, being our attorney. We had no notice of either of these judgments, (see testimony of Winchester, p. 87), and were precluded, from the nature of things, from information on the subject, and so far as Mrs. Bowman is concerned, she connot set up any rights acquired against us, *from having employed our attorneys* to obtain her judgment, which was antagonistic to and destructive of our mortgage and privilege; all of which is apparent from the judgments rendered in the State Supreme Court, in which no

mention is made of the point of the absolute nullity of Mrs. Bowman's judgment, at the time it was set forth as an existing privilege on Wavertree plantation.

Mrs. Bowman has no right to question our privilege—we loaned over money on her renunciation in our favor .

Mrs. Smyth is the only other person who now sets up title against Duncan.

She never owned a dollar in her own right, she consequently did not pay her bid for Wavertree, her title was a fraudulent one, if she acquired any under the sale at the instance of Mrs. Bowman.

She had acquired no title from having purchased Gegan's mortgage, it was subordinate to us, and it was not enforced. We have charged that any title she had was fraudulent, that she had no means to buy and the proof sustains us.

If she bought for any one, that person is not before the court, it must be that she bought and took the assignment of Gegan's claim for her father, Elam Bowman, in whose family she lived, before, at the time of, and since the purchase, she being a feme covert, without separate property, and he being the person most interested in covering his property and defeating his creditors.

It must be observed, that Elam Bowman, the mortgagor, was not a party to the proceedings in concurso, either in person or by the attorney ap-

pointed to represent him, and consequently he was not affected thereby.

If any force is to be given to the judgment of the Supreme Court, of Louisiana, it is to be observed it was rendered on a state of facts, so far as Mrs. Bowman's judgment is concerned, totally different from the real case now before the court and on an absence of any evidence as to the circumstances which debarred Duncan from re-inscribing his mortgage within ten years from the date of the original inscription. No question was raised under the agreement filed in the case except, except, the question of priority on the face of the papers. This excluded the question of the validity of Mrs. Bowman's judgment and the necessity for re-inscription of Duncan's mortgage under the circumstances, established in this case. Those questions were not decided by the Supreme Court of Louisiana, and were not embraced within the scope of the case presented to that court.

The attorney who acted for Mrs. Bowman and Mr. Duncan, in that matter had no power or authority to enter into the agreement without Duncan's knowledge or consent, because it was an agency he could not undertake, at the same time for antagonistic interests.

And furthermore in every concurso, which means a proceeding for the distribution of the proceeds of property among persons claiming privileges thereon

there must be a res, something for the decree of distribution to rest upon, for such purpose jurisdiction cannot be acquired by consent. In this case, when the case on the concurso was tried, there was no property under seizure, therefore no proceeds to distribute, no res in possession, or under control of the court, all the executions, or orders of seizure and sale had been returned by order of the attorneys—and Elam Bowman was in no way a party to the concurso. Succession of Day, 2 A. 896, Hickman & Fleiniker, 12 A. 268.

It is therefore clear the Court had no jurisdiction to render a decree regulating priorities on a fund not in existance, or as to property not under its control; such a proceeding is in rem, and without possession of the res there can be no jurisdiction to decree distribution.

Respectfully submitted,

ROBERT MOTT,

THOS. J. SEMMES,

of Counsel.

Supreme Court of the United States

No. 929.

STEPHEN DUNCAN, APPELLANT,

VERSUS

WILLIAM GEGAN, ELAM BOWMAN, BARBARA S. BOWMAN, JOHN SMYTH, AND REBECCA M., HIS WIFE.

ON APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF LOUISIANA.

Brief for Appellees.

STATEMENT OF THE CASE.

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STATEMENT OF THE CASE.

On the second of February, 1855, Elam Bowman executed a mortgage in favor of Stephen Duncan on three thousand four hundred acres of land in the parish of Tensas; and his wife, Mrs. Barbara S. Bowman, intervened in the act, and renounced her rights of tacit mortgage in favor of Duncan. This act of mortgage was inscribed in the recorder's office of the

parish of Tensas on the third of February, 1855, and reinscribed on the 13th of September, 1865—*more than ten years after the first inscription.* Trans. pp. 26–30.

On the tenth of January, 1861, Bowman executed another mortgage on a portion (one thousand nine hundred and twenty acres) of the land affected by the Duncan mortgage, in favor of Shaw, tutor of William Gegan, which was inscribed on the day of its execution. Mrs. Bowman made no renunciation in favor of this mortgage. Trans. pp. 9–13.

On the 18th of May, 1866, Mrs. Bowman obtained judgment against her husband, dissolving the community between them, and also for the sum of $13,278 42 and interest, with recognition of her legal and tacit mortgage upon all of the property of her husband, to date and rank, for $9325 from the years 1840 and 1845, and for $3953 25 from January 1st, 1862. Trans. p. 40.

On the 26th of December, 1865, Duncan brought suit upon his mortgage notes, *via ordinaria*, in the district court for the parish of Tensas, Trans. pp. 18–19; obtained judgment on the 19th of May, 1866, with recognition of his mortgage, Trans. pp. 30–1; and in December, 1866, took out a *fi. fa.* which, on the 2d of March, 1867, was returned unsatisfied, by order of his counsel, and an *alias* writ taken out the same day, which, by order of Duncan's counsel, was returned May 7th, 1867, and the sale postponed. Trans. pp. 30–33.

On the 29th of January, 1869, Duncan again seized and advertised the mortgaged property for sale, the sale to take place *on the third of April, 1869.* Trans. pp. 34–36.

Mrs. Bowman, under her judgment, with recognition of her mortgage as aforesaid, had also taken out execution and caused the property to be seized and advertised to be sold under her writ on the same day, viz.: *April 3d, 1869.* Trans. pp. 44–46.

On the 3d of April, 1869, the day upon which the sales were advertised to take place, Wm. Gegan, who had then attained his

majority, instituted suit, in the same court, to which he made both Duncan and Mrs. Bowman *parties defendant.* In his petition he alleged that his mortgage, which originally was inferior in rank to that of Duncan, had since become superior in rank thereto by reason of Duncan's failure to reinscribe his mortgage within ten years from the time of its first inscription, and that it was entitled to rank only *from the date of its second inscription*, the 13th of September, 1865, while Gegan's mortgage was entitled to rank from the date of its original inscription, the 10th of January, 1861.

Gegan also alleged in his petition that Mrs. Bowman's judgment was fraudulent and collusive, and the recognition of her tacit mortgage therein null and void ; and that therefore the mortgage held by him was in reality the first mortgage upon the 1920 acres affected by it. The filing of this suit by Gegan stopped the sale until the validity of Mrs. Bowman's mortgage and the relative rank of the several mortgages could be determined. Trans. pp. 1–3

A triangular contest was thus inaugurated. Mrs. Bowman claimed priority for her mortgage over that of Duncan because her renunciation in his favor ceased to have effect after ten years elapsed without reinscription of the Duncan mortgage; and that for the sum of $9325, as to which her mortgage took date and rank from the years 1840 and 1845, it was prior to Gegan's mortgage, which ranked only from the 10th of January, 1861, and in favor of which she had made no renunciation. As to the sum of $3953 25, for which her mortgage took date, and rank only from January 1st, 1862, the priority of the Gegan mortgage over it was not contested. Duncan joined with Gegan in contesting the existence and validity of Mrs. Bowman's mortgage, and also contended that even if the mortgage was a valid and existing mortgage, the effect of her renunciation in his favor had not been lost by the failure to reinscribe his mortgage within the ten years ; and that as his mortgage was therefore entitled to rank Mrs. Bowman's, and Mrs. Bowman's

was entitled to rank Gegan's, his mortgage must also rank Gegan's. See answers of Mrs. Bowman and of Stephen Duncan. Trans. pp. 4–5. These issues, thus contradictorily joined between the parties, were contradictorily tried in the District Court, and judgment rendered thereon on the 3d of November, 1869. Trans. p. 54. All of the parties being dissatisfied with the judgment of the District Court, took appeals to the Supreme Court of the State, Trans. p. 53; and that tribunal, after argument and hearing all the parties, Duncan as well as the others, rendered judgment definitively determining all the issues raised in the litigation, and passing finally upon all the merits of the cause, which decision is to be found reported in 22 A. 336, and at pp. 54 *et seq.* of this transcript. That Court, after a full discussion of the merits of the cause, say:

"In this view of the case, which in our opinion is based on correct principles of law, all difficulty in settling the respective rights of the mortgagees disappears. Mrs Bowman holds the first mortgage for $9325 on all the property of her husband, and for the whole of her judgment, $13,278 42, with interest as allowed on the 1480 acres not subject to Gegan's mortgage. Gegan has the second mortgage on the 1920 acres described in his act, and Duncan comes last, as his mortgage takes effect only from the day of its reinscription. It follows that if the 1420 acres will pay Mrs. Bowman's mortgage, she will take none of the proceeds of the land mortgaged to Gegan; but if not, she can claim no part of the $3952 42 until Gegan is paid; and if there is any surplus after paying the said two sums to Mrs. Bowman and that due Gegan, it will go to Duncan. As the record shows that the land was not sold at the date of the appeal, the cause must be *remanded for distribution*."

The mandate of the Supreme Court was returned to the court *a qua* and filed in said court on the 4th day of June, 1870. Trans. p. 56. The judgment rendered by the Supreme Court passed finally upon the rights of the parties to said suit, and fixed definitively their relative rights upon the property.

On the 12th day of July, 1870, both Gegan and Mrs. Bowman took out executions against the property. Trans. pp. 13-14, and 44-49. Gegan seized the part subject to his mortgage, and Mrs Bowman the entire property; and after due notices of seizure the property was advertised for sale on the third day of September, 1870, by the sheriff of Tensas parish, and was bought at said sale by Mrs. Rebecca M. Smyth, she having bid two thirds of the appraised value. The sale did not realize sufficient to pay the demands of Mrs. Bowman. The 1920 acres mortgaged to Gegan, being the valuable part of the property, the balance, 1480, being appraised at only one dollar per acre, did not bring sufficient to pay Gegan's mortgage, even if Mrs. Bowman's mortgage was null and void. Mrs. Smyth complied with the terms of sale, paid the costs to the sheriff in cash, and was credited on the writ for the balance by direction of Mrs. Bowman's attorney, the whole of the proceeds of the sale being insufficient to satisfy her first mortgage claims as ranked and determined by the Supreme Court of the State, received her deed from the sheriff, and went into possession of the property.

On the 26th day of April, 1876, *more than five years* having elapsed since the sale to Mrs. Smyth, Stephen Duncan filed his petition for the removal of the suit to the Circuit Court of the United States for the District of Louisiana. In this petition, which is to be found at page 149 of the transcript, Duncan avers, "that on the 3d day of May, 1869, one William Gegan, who was and is a citizen of the State of Louisiana, filed his petition in this court *against Barbara S. Mobley*, wife of *Elam Bowman*, then a citizen of the State of Louisiana, *and your petitioners, as defendants thereto, for the purpose of fixing the rank of mortgages* executed by Elam Bowman on a certain plantation known and described as Wavertree plantation, situated in the parish of Tensas. That said suit is *now pending in this court and undetermined*, and the matter in dispute exceeds the sum of five hundred dollars, exclusive of costs. And your petitioner

further states that he has reason to and does believe that, from prejudice and local influence, he will not be able to obtain justice in this court." And the petitioner thereupon prays the removal of the case into this court, under provisions of the act of *March 2d, 1867.*

At the time of the filing of this petition for removal there was *no issue whatever pending for trial between the parties in the State court.* The whole purpose of the suit brought by Gegan against Duncan and Mrs. Bowman was, *as stated in the petition for removal itself*, to determine the validity and rank of the mortgages claimed by the several parties. There never were any other issues made between the parties in the State court, and those issues were definitively and finally determined contradictorily between them by the decree of the Supreme Court. The falsity of the averment, therefore, in the petition for removal, that the suit was still pending and undetermined in the State court, is patent upon the face of the record. The case was remanded to the District Court solely "for distribution," upon the basis definitively settled and determined by the Supreme Court. After the mandate was filed in the District Court, its process issued under the Bowman and Gegan mortgages, both of which had been decided by the Supreme Court to be superior in rank to the Duncan mortgage, and the property was sold thereunder to Mrs. Smyth, publicly and after due advertisement, for more than two thirds of its appraised value, but for less than enough to pay even the first or Bowman mortgage. *No opposition whatever* was made at the time of these proceedings, or at any other time *in the State court,* by Duncan to the sale of the property under the Bowman and Gegan writs. From the time of the filing of the mandate of the Supreme Court, on the 4th of June, 1870, no pleading of any kind, no petition, opposition, rule, or motion was filed in the suit in the State court, until April 15th, 1876, *more than five years* afterward, when a motion was made by counsel for Duncan "that the suit be reinstated on the frial docket," although *there*

were no issues then, or ever afterward, pending for trial in the State court between the parties. The very next step taken by Duncan in the State court was the filing on the 26th of April, 1876, of his petition, and obtaining the order for removal of the suit to this court. The order was granted *ex parte*, and on the 27th of April, 1876, on motion of counsel for Wm. Gegan, and on the grounds, among others, that the case had already been passed upon finally upon the merits, and was *res judicata* between the parties; and that the United States Circuit Court could not take jurisdiction of the case by reason of the citizenship of the parties thereto, the plaintiff being a citizen of Louisiana and two of the defendants being citizens of the same State; and that, therefore, the suit was not subject to removal under the act of Congress, the State court *rescinded the order* for removal, which had been granted *ex parte* the day before. Nevertheless the petitioning defendant, Duncan, filed a transcript of the record of the suit in the United States Circuit Court on the 6th of November, 1876. On the 3d of January, 1877, the other parties to the suit filed there an exception to the jurisdiction of that court, the sustaining of which would have had the same effect as the granting of an order to remand. This exception was finally overruled on the 20th of January, 1877, erroneously, as we respectfully submit. The objection to the jurisdiction of that court is fundamental, and may be urged at any stage of the proceedings. In overruling the exception the court was understood to hold distinctly that it could not and would not go behind the decision of the Supreme Court, which definitively determined the validity and rank of the several mortgages, but would entertain jurisdiction *solely for the purpose of determining issues between the parties relating to the distribution of the property under and in accordance with the decree of the Supreme Court.*

The exception was overruled on the 20th of January, 1877; and on the 29th of that month the defendant, Duncan, assuming in the Circuit Court *for the first time the entirely new character*

of PLAINTIFF or complainant in equity, filed a bill not only against the other parties to the suit in the State court, but making Mrs. Smyth also a party, *who never had been a party to the suit in the State court.* This bill is not the reforming of any pleading of Duncan's in the State court, in order to make it conform to the rules of chancery procedure, *for there was no pleading whatever of his in the State court* to be recast or reformed there. *All of the issues* tendered by the bill are issues none of which were pending in the State court and removed to this court, but all, except those already definitively decided by the Supreme Court of Louisiana, raised and tendered to the other parties by Duncan, *in this court, for the first time.* And the whole scope and object of the bill, instead of being confined to the purposes for which alone the Circuit Court was understood to assert jurisdiction, the control and regulation of the distribution of the mortgage fund, under and in conformity to the decree of the Supreme Court, is to have the Circuit Court retry and determine anew the very issues before tried and determined by the State court. For the Supreme Court of the State definitively determined "that Mrs. Bowman holds the first mortgage for $9325 on all the property of her husband, and for the whole of her judgment ($13,278 42, with interest as allowed) on the 1480 acres not subject to Gegan's mortgage. Gegan has the second mortgage on the 1920 acres described in his act; *and Duncan comes last*, as his mortgage takes effect only from the day of its reinscription." 23 A. 237, Gegan vs. Bowman et al. While the prayer of Duncan's bill here is, "that the lien and privilege granted by said Elam Bowman, in the said mortgage, on the second day of February, 1855, in which his said wife, Barbara, joined and renounced her rights of mortgage and privilege, be recognized and maintained as against said Elam Bowman, Barbara S. Mobley, his wife, and against said William Gegan, and against said Rebecca M. Bowman, wife of John Smyth; and that said mortgage be declared executory against the said property described therein."

The bill filed in the Circuit Court avers that Gegan's mortgage is second in rank to Duncan's, and that Mrs. Bowman's mortgage is inoperative, because her judgment against her husband was collusive, fraudulent, and null and void; and that the sale made under her mortgage by the sheriff, on September 3, 1870, was also null and void; and that the purchase at said sale by Mrs. Smyth was a simulation, because Mrs. Smyth was the adopted daughter of Mr. and Mrs. Bowman, and without means; and that the decree of the Supreme Court was void, because the mortgaged property was not under seizure when it was rendered, etc.

To this bill Gegan answered, maintaining the validity and finality of the judgment of the Supreme Court, and that that decree definitively determined contradictorily between the parties all issues as to the validity and rank of the several mortgages, and that the cause was remanded solely for the purpose of distribution upon the basis of the decree; and averring that the mortgaged property was not, at the date of that decree, and has not been at any subsequent time, of sufficient value to pay the mortgages superior in rank to that of Duncan; and that by reason thereof, after the decree of the Supreme Court determining said mortgage to be last in rank, *it ceased to be of any value whatever;* and that thenceforth Duncan had no actual interest in the sale of the property and the distribution of the proceeds, which in no event would be sufficient to pay the mortgages prior to his own, and which, when publicly sold, after due advertisement, did not bring enough to satisfy even the first mortgage. Gegan furthermore avers that prior to the sale of the property, on the third of September, 1870, he had sold and conveyed to Mrs. Smyth all his mortgage rights, and therefore disclaims any further interest in the controversy.

Mr. and Mrs. Bowman in their answer aver that Duncan obtained judgment on his mortgage notes *via ordinaria* on the 19th of May, 1866, and that the notes became and were

merged in the judgment, and that the judgment became and was prescribed by the lapse of ten years from its rendition, without any steps being taken within that time to revive it, as required by the law of Louisiana; and that by the prescription of the judgment the mortgage became extinguished with it; and that even if the mortgage were still in existence, and its original rank had been preserved by its reinscription in September, 1865, it lost its rank and became perempted from not having been reinscribed a second time within the next ensuing ten years, the said mortgage not having been reinscribed a second time until after the month of September, 1875.

They further aver that all of the alleged rights of the said Duncan as against them were at issue between them, and definitively determined by the Supreme Court by its decree in the suit removed into the Circuit Court upon the petition of said Duncan, and in which suit this bill is filed; that the said suit was remanded by the Supreme Court of Louisiana to the District Court solely for the purpose of distribution upon the basis of the judgment of the Supreme Court, and not for the purpose of retrying any of the issues determined by said judgment; and that the said suit was not pending in the District Court for any such purpose when application was made by Duncan for its removal into this Court; and that, after the decree of the Supreme Court, Duncan ceased to have any real interest in the question of distribution, for the reason that the value of the mortgaged property was altogether inadequate to satisfy the mortgages decreed by the Supreme Court to be prior in rank to Duncan's mortgage, which was decreed to be last in rank; and that after the decree of the Supreme Court settling the rank of the mortgages and remanding the cause for distribution, it was a matter of no real or practical importance whatever to any of the parties whether the property was sold under a formal order pursuant to the mandate, or sold as it was under execution to enforce the mortgages determined by the Supreme Court to be first and second in rank, as the *rule of dis-*

tribution was precisely the same under either form of procedure, and *the distribution subject alike under either form* at the instance of any party in interest to the supervision and control of the court to which the case had been remanded for distribution. Under neither form of procedure would there in any event be any thing to distribute to the third mortgage creditor, until the first and second mortgage creditors *were paid in full.* That if it had been a matter of any advantage or concern to Duncan, he could have objected and insisted on a formal order of sale under the mandate; but though he was a party to the suit, and present in court by his counsel, he took no steps whatever to have the property sold under the mandate, but stood by and permitted it to be sold without objection, under executions to enforce the prior mortgages; and that Duncan's inaction at the time is attributable to the fact that it was a matter wholly immaterial to him whether the property was sold in the one way or the other.

And they say that if the suit can be considered as still pending in the State court for any purpose, when the petition for removal was filed, it was certainly not then pending at such a stage or under such conditions as to warrant the reopening or retrying of any of the issues between the parties which had already been determined by the Supreme Court; but was there depending solely for the enforcement and carrying out of the mandate of the Supreme Court requiring the distribution of the proceeds of the mortgaged property when sold to be made in the order of priority determined by that decree; and they further say that by the removal of the suit to the Circuit Court from the State court at a stage of proceedings when nothing remained to be done but to obey and execute the mandate of the Supreme Court, that Court has acquired no jurisdiction to revise or set aside in any manner the said judgment of the Supreme Court, or to reopen and retry between the parties the issues determined between them by said judgment; and against so much of the said bill as seeks to draw the said matters into

controversy in this Court they plead the said judgment of the Supreme Court in bar as *res judicata*.

They aver that the property, after due advertisement, was publicly sold at sheriff's sale, under executions to enforce prior mortgages; that it sold for two thirds of its appraised value, but for an amount insufficient to pay in full either of the mortgages prior in rank to the Duncan mortgage.

Mrs. Smyth answers that she was no party to the suit removed from the State court; that she bought the property in question at sheriff's sale in September, 1870, in good faith, for its value, and paid the price of the sale. She adopts all of the defenses set up by her co-defendants; avers that she was the owner of the Gegan mortgage at the time of the sale, and that the property did not sell for sufficient to satisfy that mortgage, and that even if the Bowman mortgage had been null, the Gegan mortgage would have absorbed the entire proceeds of the property subject to his mortgage.

Both Mrs. Smyth and Mrs. Bowman, in their answers in reply to the charge in the bill that the sale to Mrs Smyth was a simulation, for the benefit of Mr. and Mrs. Bowman, say that the charge is preposterous upon its face, for the reason that if Mrs. Bowman had desired it there was no impediment whatever to her purchasing the property at the sheriff's sale and taking title openly in her own name, as she was separate in estate from her husband by a judgment, the validity of which had been recognized by the Supreme Court, with all the rights of a first mortgage creditor upon the property, to an amount in excess of the price for which the property sold, under the express terms of the judgment of that court in this very suit.

On the 29th of March, 1879, a final decree was rendered in the cause by the Circuit Court, to be found at page 108 of the transcript. It is as follows:

"The Court considering that the validity and rank of the several mortgages referred to in the pleadings, respectively claimed by Mrs. Barbara S. Bowman, William Gegan, and

Stephen Duncan, as bearing upon the real estate described in the pleadings, was finally determined by the Supreme Court of Louisiana, contradictorily between those parties by its judgment rendered in this cause prior to its removal to this Court from the State courts, which judgment is especially set forth and pleaded in the answers of the several defendants; and considering that said judgment of the Supreme Court of Louisiana remanded the suit to the lower court solely for purposes of distribution, and in order that the fund arising from the sale of said real estate should be applied to the satisfaction of said respective mortgages in the order of priority established by said judgment of the Supreme Court of Louisiana, and it appearing from the evidence in the cause that after said suit had been so remanded the real estate was sold under the two mortgages determined to be superior in rank to the mortgage claimed by Stephen Duncan, and that the fund arising from said sale was actually distributed and applied in the manner and order of priority required by said judgment of the Supreme Court of Louisiana, it is now ordered, adjudged, and decreed that the bill herein exhibited against the said Barbara S. Bowman, Elam Bowman, William Gegan, Rebecca M. Smyth, and John Smyth be dismissed as to all of those parties, and that he be condemned to pay the costs to be taxed incurred by them herein respectively."

It is upon Duncan's appeal from this decree that the cause is now before this court.

ARGUMENT.

On behalf of the appellees, we respectfully submit:

1. That the Circuit Court erred in overruling the exception to its jurisdiction.

2. That if the Circuit Court had jurisdiction the decree appealed from is correct, and should be affirmed.

I.

AS TO THE JURISDICTION.

"The right of removal is statutory. Before a party can

avail himself of it he must show upon the record that his is a case which comes within the provisions of the statute." Ins. Co. vs. Pechner, 95 U. S. 185.

Duncan, upon whose petition the cause was removed, was one of several *defendants* to the suit in the State court, in which suit Gegan was plaintiff. About this there can be no doubt; it is apparent upon the face of the record; and the petition for removal itself recites that in the suit sought to be removed Wm. Gegan filed his petition, as plaintiff, against Barbara S. Mobley, wife of Elam Bowman, and the petitioner, Stephen Duncan, *as defendants*. Trans. 56.

It appears upon the face of the record that while Duncan, one of the defendants, is a citizen of New York, Mr. and Mrs. Bowman, the other defendants, are citizens of Louisiana, as is also Wm. Gegan, the plaintiff. The Court will bear in mind that the application to remove is made under the act of *March 2, 1867*. Now the question is, can a cause be removed from a State to a Federal court under the provisions of that act, upon the petition of one defendant, a citizen of a State different from that where the suit is brought, where the plaintiff and other of the defendants are citizens of the State where the suit is brought. This identical question has been passed upon by this Court, which has decided that under such circumstances a case can not be removed from the State to the Federal court under the act of 1867.

In the case of the Sewing-Machine Companies, 18 Wall. 586, the court said:

"Either the non-resident plaintiff or non-resident defendant may remove the cause under the last-named act (of 1867), provided all the plaintiffs or *all the defendants join in the petition* and all the parties petitioning are non-residents, as required under the judiciary act; but it is a great mistake to suppose that any such right is conferred by that act where one or more of the plaintiffs, or one or more of the petitioning defendants, are citizens of the State in which the suit is pending, as the

act is destitute of any language which can be properly construed to confer any such rights, unless all the plaintiffs or all the defendants are non-residents and join in the petition."

Again, in Vannevar vs. Bryant, 21 Wallace 43, Chief Justice Waite, delivering the opinion of the whole court, said: "In the case of the Sewing Machine Companies it was held that an action upon a contract by a plaintiff who was a citizen of the State in which the suit was brought against two defendants who were citizens of other States, and a third who was a citizen of the same State as the plaintiff, was not removable into the Circuit Court under this act (of 1867) upon the petition of the two non-resident defendants. Without considering the question whether in an action of tort by a resident plaintiff a non-resident defendant can, at a proper stage of the proceedings, and upon proper showing, remove the cause as against himself into the Circuit Court under the act of July 27, 1866, we are clearly of opinion that this case comes within the principle settled in that of the Sewing-Machine Companies. The petition was filed under the act of 1867 for a removal of the suit, and not under the act of 1866 for its removal as against the non-resident defendant."

In Vannevar vs. Bryant the plaintiff and four of the defendants were citizens of Massachusetts, and three of the defendants were citizens of Maine. The application to remove was made under the act of 1867 by the citizens of Maine, and was refused by the State court, from which the case came to this Court, where the order of the State court, refusing to allow the transfer was assigned for error; but, as has been shown, the Court held that it was correct.

But even if there had been no obstacle to the removal on the grounds just stated, there is another and quite as fatal an objection to be met.

In the case last referred to, Vannevar vs. Bryant, 21 Wall. 43, the Court said: "The transfer was also properly refused for another reason. The act authorizes the petition for re-

moval to be filed 'at any time before the final hearing or trial of the suit.' *The hearing or trial here referred to is the examination of* THE FACTS IN ISSUE. Hearing applies to suits in chancery, and trial to actions at law. In Insurance Company vs. Dunn, 19 Wall. 214, it was held that after a motion for a new trial had been granted a removal might be had. But after one trial the *right to a second must be perfected* before a demand for the transfer can properly be made. *Every trial of a cause is final* until in some form it has been vacated. *Causes can not be removed to the Circuit Court for a review of the action of the State court, but only for trial.*"

Now, the manifest and sole object of the removal in the present case was not for the trial of any issue pending at the time of the removal for trial in the State court, for there was absolutely no issue there pending for trial at that time, but to have reviewed here the action of the State court, definitively determining every issue ever made between the parties in the State court. The judgment of the Supreme Court was final upon all those issues, and nothing more remained to be done after judgment in that court than what remains to be done after every final judgment, and that is its execution, to insure which the mandate of the Supreme Court was addressed to the District Court.

In Abbott's United States Practice, volume 2, page 223, it is said: "To constitute a 'final' decree in equity, so as to authorize an appeal, the decree should finally determine all matters within the pleadings, so that an affirmance of the decree will end the suit. If this is the effect of the decree, if the rights of the parties are completely determined, it may be regarded as 'final,' *notwithstanding something remains to be done before those rights can be effectually separated and distinctly enjoyed.* Thus a decree for the foreclosure and sale of mortgaged premises is regarded as a final decree before the return and confirmation of a report of sale. *It disposes of the merits of a controversy; and the ulterior proceedings are but a mode of*

executing the original decree, like the award of an execution at law."

In Forgay vs. Conrad, 6 How. 203, Chief Justice Taney, delivering the opinion of the Court, said: "The question upon the motion to dismiss is whether this is a final decree, within the meaning of the acts of Congress. Undoubtedly, it is not final in the strict technical sense of the term. But this Court has not heretofore understood the words 'final decrees,' in this strict and technical sense, but has given to them a more liberal and, as we think, a more reasonable construction, and one more consonant to the intention of the Legislature.

"In the case of Whiting vs. the Bank of the United States, 13 Peters 15, it was held that a decree of foreclosure and sale of mortgaged premises was a final decree, and the defendant entitled to his appeal without waiting for the return and confirmation of the sale by a decretal order. And this decision is placed by the court upon the ground that the decree of foreclosure and sale was final upon the merits, and *the ulterior proceedings but a mode of executing the original decree.* The same rule of construction was acted upon in the case of Miçhaud and others vs. Girard and others, 4 How. 503."

And see to the same effect Bronson vs. Railroad Company, 2 Black. 527.

Another ground of objection to the jurisdiction of the Circuit Court is that no sufficient oath, as required by the act of 1867, was made. In overruling the exception to the jurisdiction, the District Judge said: "The oath was taken before a commissioner appointed by the Governor of Louisiana, under the laws thereof, in Mississippi. I am satisfied that the statute does not authorize this officer to administer the oath to the affiant in this case, for two reasons: 1. Because he does not reside in Mississippi. 2. Because the oath is not with refer-

ence to the acknowledgment or proof of an instrument transferring property. But the law of Congress, *as it now stands*, does not require an affirmation to the petition, the theory of the law seeming to be that upon the presentation of the petition with the proper bond, the cause shall be removed, and the inquiry into the truth of the allegations which give jurisdiction shall be had in the Circuit Court."

The application in this case to remove was made distinctly under the act of 1867, and not under the act of 1875. But it is true that in the case of Barnham vs. Chicago, Dubuque, and Minnesota Railroad Company, referred to in Judge Dillon's Treatise on the Removal of Causes, at page 14, note 23, where the application to remove was made under the act of 1867, and the removal was not maintainable under that act, the Circuit Court for the district of Iowa held that it could be maintained under the act of 1875, notwithstanding the application for removal had been made under the act of 1867. But this was *upon the ground that the case was one which was clearly removable* under the act of 1875. The present case, on the contrary, is one which is *clearly not removable under that act*, for this reason, if no other, that the petition for removal was not filed within the time limited by that act.

In his Treatise on the Removal of Causes, Judge Dillon, at pages 16 *et seq.*, says: "The act of 1875, on the one hand, adds to or enlarges the classes of cases that may be removed, and on the other hand *restricts the time* in which the removal must be applied for within narrower limits than the acts of 1866 and 1867.

"In respect of the *time* in which the removal must be applied for, the provision is that the petition therefor must be filed in the State court, 'before or at the term at which the cause *could be first tried, and before the trial thereof.*' The decisions under the acts of 1866 and 1867, as to removals, *after one trial had and a new trial granted*, which will be alluded to hereafter, may not be and probably are not applicable under the act of 1875."

At page 29 he says: "Although there is some conflict between the State and Federal courts on the point, yet the weight of the cases and the authoritative view is that if the trial court has *wholly set aside a verdict and granted a new trial*, or, if the State appellate court has wholly reversed the judgment, and remanded the case to the court of original jurisdiction *for a trial de novo*, then in either event it is not too late, under the act of 1866 or 1867, to apply to remove the cause, *as it is in the same posture as before the first trial or hearing was had.* * * * Under the act of 1875 the time for removal is greater than under the judiciary act, but not so great as under the acts of 1866 and 1867 last noticed. The act of 1875 requires the petition in the State court to be made and filed therein 'before or at the term at which such cause *could be first tried, and before the trial thereof.*' The word term, as here used, means, according to the construction which it received in the Eighth Judicial Circuit, the term at which, under the legislation of the State and the rules of practice pursuant thereto, the cause is first triable—*i. e.*, subject to be tried on its merits—not necessarily the term when, owing to the pressure of business or arrearages, it may be reached in its order for actual trial."

The mandate of the Supreme Court in this suit was filed in the District Court for the parish of Tensas, *on the fourth of June, 1870.* As appears from sections 1927 and 1929 of the Revised Statutes of Louisiana, there are two terms of the District Court held in the parish of Tensas each year, beginning on the third Mondays of April and October. The act of Congress of 1875 was passed on the third of March of that year. The petition for the removal of this suit was filed in the District Court for the parish of Tensas at the April term, 1876. Between the date of the passage of the act and the time of the filing of the petition, the April and October terms of 1875 intervened. It was utterly impossible for the petitioner to bring himself within the requirements of the act of 1875, and he therefore made his application under the act

of 1867. We respectfully submit that we have shown that he was not entitled to remove the cause under the provisions of the latter act, and that, therefore, the suit never lawfully came under the cognizance of the Circuit Court.

If jurisdiction ever attached there for any purpose, it certainly did not attach for the purpose of enabling that court to review, revise, set aside, or amend in any way the definitive judgment of the Supreme Court of Louisiana determining the validity and rank of the several mortgages, or for the purpose of reopening and retrying any of the issues theretofore tried and determined contradictorily between the parties in the State courts. The Circuit Court in overruling the exception to its jurisdiction distinctly disclaimed any such power, and limited its assertion of jurisdiction strictly to the matter of the enforcement of the mandate of the Supreme Court of the State. We have already called the attention of the Court to the fact that no issue or controversy with reference to the mode of enforcement of that mandate *ever arose or was pending* between the parties *in the State court*—and that, therefore, no controversy of the kind *was removed* from the State court into the Circuit Court.

If there had been any such proceeding in the State court growing out of or grafted on to the original suit between the parties, all the merits of which had been definitively passed upon and finally determined by the Supreme Court of the State, it is more than doubtful, under the authority of Bank vs. Turnbull, 16 Wall. 193, whether such a proceeding would have been lawfully removable into the Circuit Court; for in that case it was held that where a proceeding in a State Court is merely incidental and auxiliary to an original action there—a graft upon it, and not an independent and separate litigation--it can not be removed into the Federal courts under the act of March 2, 1867, authorizing under certain conditions the transfer of "suits" originally instituted in the State courts.

If neither the old suit determined by the Supreme Court, nor any new suit or controversy growing out of the old suit and pending in the State court, was *removed* into the Circuit Court for trial, then nothing was *removed* there for trial. The elaborate bill of complaint filed there by Duncan is not and does not purport to be a repleader—a reforming or recasting of any pleading ever pending in the State court. In point of fact, and as appears from the record, from the time the mandate of the Supreme Court came down until the filing of the petition for removal more than five years afterward, nothing whatever in the shape of a pleading was filed in the State court except a motion at or about the same time to reinstate the case on the trial docket. The issues tendered by Duncan's bill, except such as had already been definitively determined by the Supreme Court of Louisiana, were tendered in the Circuit Court for the first time, and never were pending in the State court, and, therefore, could not have been removed from that court into the Circuit Court. Duncan, who was one of the *defendants* in the suit removed, assumes in the Circuit Court, in the bill of complaint which he filed in the suit removed, the new character of *plaintiff* or complainant; and, whereas, all parties who have appeared to a suit removed from a State court into a Federal court are brought into the Federal court by the mere effect of the removal, Duncan, the defendant plaintiff, by his bill filed in the Circuit Court *prayed process of subpœna* not only against the parties to the suit in the State court but to an entirely new party, Mrs. Rebecca M. Smyth.

II.

If the Circuit Court had jurisdiction, then the decree appealed from is correct. and should be affirmed.

The bill in chancery was filed within a few days after the decision of the Circuit Court, whereby, in overruling the exception to the jurisdiction, it disclaimed any right to review the decree of the Supreme Court or retry the issues settled by that

decree. But the bill, instead of being framed in conformity to that ruling, was drawn in open disregard thereof, for its whole scope and aim and object was to reopen and retry in the Circuit Court the issues between the parties theretofore tried and determined contradictorily between them in the State court, and to have that court reverse and avoid the decree of the Supreme Court of Louisiana, which definitively determined those issues between the parties. We submit that the plea of *res judicata* as to all these matters, which was interposed by all the parties made defendants to Duncan's bill, should be sustained; and that all the testimony taken with a view to the re-examination of the issues determined by the decree of the Supreme Court, or to the end of invalidating or avoiding that decree, should be disregarded.

The attempt to evade the effect of the plea of *res judicata* by the averment in the bill that the counsel who appeared for Duncan were without authority, is not only not sustained by the testimony taken to support it, but the reverse is shown by the testimony of Judge Winchester, who testifies that he was the attorney of Duncan, with authority to employ counsel in Louisiana, and that he placed the claim against Elam Bowman in the hands of Messrs Farrar & Reeves. Trans. p 88.

The averment of the bill that the Supreme Court was without jurisdiction when the decree was made, because the mortgaged property was not then under seizure, is hardly worth noticing, as the State court clearly had jurisdiction by reason of the appearance and answers of all the defendants, Duncan among them.

If the plea of *res judicata* is sustained to so much of the bill as it is applicable, there is nothing of it left of any importance whatever. Unless Duncan's last mortgage can be made first, the sole purpose of his bill is foiled. It will not avail him at all to have the sale of the property to Mrs Smyth set aside, if it is to be sold again subject to the mortgages as recognized and ranked by the decree of the Supreme Court.

But we say now that even if the decree of the Supreme Court could be set aside, and the question of the rank of his mortgage be tried *de novo*, it would certainly be ranked last, if not by reason of the failure to reinscribe within ten years following the first inscription, certainly for the failure to reinscribe it a second time within the ten years following the reinscription.

"After the lapse of ten years, without reinscription before that time, subsequent mortgages are not affected by the first inscription; and neither notice nor even the pendency of a suit on the mortgages dispenses with reinscription." Watson vs. Bondurant, 30 A. 1.

But we go further, and say that Duncan is no longer even last mortgage creditor, or creditor at all, of Elam Bowman, for reason that his notes were merged in the judgment recovered upon them on the 19th of May, 1866, and the judgment itself is extinguished by prescription by reason of his failure to revive it against Elam Bowman within ten years, in the manner required by the law of Louisiana.

One of the modes specified in the Code by which obligations are extinguished is novation. C. C. 2130.

This is the merger of the common law. In Freeman on Judgments, sec. 215, it said: "The cause of action, though it may be examined to aid in interpreting the judgment, can never again become the basis of a suit between the same parties. It has lost its vitality; it has expended its force and effect. All its power to sustain rights or enforce liabilities, has terminated in the judgment or decree; 'it is drowned in the judgment.' The original title merges in the judgment." 9 L. 418; 3 A. 387; 12 A. 736; 7 A. 333; 1 A. 372.

Section 2813 of the Revised Statutes of Louisiana enacts that: "Hereafter all judgments for money, whether rendered within or without the State, shall be prescribed by the lapse of ten years from the rendition of such judgment. *Provided, however*, that any party interested in any judgment may have the same revived at any time before it is prescribed, by having

a citation issued according to law to the defendant, or his representative from the court which rendered the judgment."

Prescription against a judgment can not be interrupted, except by a suit to revive. Smith vs. Palfrey, 28 A. 616.

Duncan's mortgage, being last in rank when the property was sold, at sheriff's sale, to Mrs. Smyth, and the mortgages prior in rank being for an amount largely in excess of the value of the property, it was of no consequence to him how the property was sold, whether directly under the mandate of the Supreme Court, or under execution to enforce the mortgages decided by the Supreme Court to be prior in rank to his. Under either mode of procedure the rule of distribution of the proceeds of the sale of the mortgaged property was precisely the same, and his share in the distribution would have been exactly the same, that is—*nothing at all.*

The property was sold under the process of the court to which the mandate of the Supreme Court was addressed, and it was optional with Duncan to invoke its active supervision of the distribution at any time. He stood by and did nothing, for the very sufficient reason, no doubt, that nothing which he could do would have availed him in the least. No opposition was filed by him in the matter, for any benefit that he might have derived from so doing would not even have been of value equivalent to the few cents it would have cost to file the paper.

If, however, the right to object to the mode of the sale was ever of any importance or value to him, he waived and lost it by his long inaction.

"There is a defense peculiar to courts of equity founded on lapse of time and the staleness of the claim, where no statute of limitations directly governs the case. In such cases the Court often acts upon their own inherent doctrine of discouraging for the peace of society, antiquated demands, by refusing to interfere when there has been gross laches in prosecuting

rights, or long acquiescence in the assertion of adverse rights.'

Wagner vs. Baird, 7 How. 234.

For these reasons, we respectfully submit that the cause should be remanded to the Circuit Court with instructions to dismiss it for want of jurisdiction; or, if it be considered that the Federal jurisdiction ever attached, that the decree appealed from should be affirmed.

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